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Censors in Cyberspace: Can Congress Protect Children from Internet Pornography Despite *Ashcroft v. ACLU*?

Amy Wanamaker

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**CENSORS IN CYBERSPACE: CAN CONGRESS PROTECT
CHILDREN FROM INTERNET PORNOGRAPHY DESPITE
*ASHCROFT v. ACLU?***

I. INTRODUCTION

The Internet is a forum unlike any other. Whether you want to view Tupac Shakur's autopsy photos, relive Janet Jackson's 2004 "wardrobe malfunction" or chat with fellow church goers, you can do it all online. This "marketplace of ideas"¹ for the twenty-first century enables people to communicate, for no cost, with others throughout the world. And, young or old, the world is logging on. As of 2004, approximately sixty-two percent of all Americans regularly used the Internet.² Today, 6.4 billion Internet users around the world³ can access any of the innumerable Web sites available online or send messages of their own.

But where there is free speech, there is controversy. Some twelve percent of all Web sites contain pornographic material⁴ that varies "from the modestly titillating to the hardest-core."⁵ These sites are easily accessible to children under eighteen; in fact, children ages twelve to seventeen represent the largest group of pornography consumers.⁶ Studies show that the average child first views pornographic material on the Internet at age eleven, and that approximately eighty percent of all children have viewed numerous hard-core pornography Web sites by the age of seventeen.⁷

1. The phrase "marketplace of ideas" is a metaphor for the idea that "the source of the message is the seller. She or he is allowed to express ideas to anyone who is willing to listen. The receiver of the message is like the buyer, and may freely decide to agree or disagree with the message." DOUGLAS M. FRALEIGH & JOSEPH S. TRUMAN, FREEDOM OF SPEECH: IN THE MARKETPLACE OF IDEAS 13 (1997). This idea has formed the basis for judicial opinions limiting government control over speech. *Id.* at 13-14.

2. PEW INTERNET & AMERICAN LIFE PROJECT, INTERNET: THE MAINSTREAMING OF ONLINE LIFE 59 (2005), http://www.pewinternet.org/pdfs/Internet_Status_2005.pdf.

3. Internet World Stats, Internet Usage Statistics--The Big Picture, <http://internetworldstats.com/stats.htm> (last visited Sept. 17, 2005).

4. Internet Filter Review, Internet Pornography Statistics, <http://internet-filter-review.toptenreviews.com/internet-pornography-statistics.html> (last visited Sept. 17, 2005).

5. *Reno v. ACLU*, 521 U.S. 844, 853 (1997) (quoting *ACLU v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996)).

6. Internet Filter Review, *supra* note 4.

7. *Id.*

Minors' increasing access to Internet pornography has not escaped congressional attention. In 1996, Congress passed the Communications Decency Act (CDA),⁸ which forbade the transmission of indecent or patently offensive materials to minors over the Internet.⁹ Web site providers and free speech advocates immediately challenged the CDA in *American Civil Liberties Union v. Reno*.¹⁰ *Reno* eventually reached the Supreme Court, where the majority wrote that the CDA's overbreadth and vagueness rendered it unconstitutional.¹¹ However, the Court's decision in *Reno* went beyond merely finding a First Amendment violation. The Court, comparing the CDA to similar statutes that had passed constitutional muster, implied that Congress could transform the CDA into legislation that would pass First Amendment scrutiny.¹² The Court seemed to assure Congress that it could regulate the Internet.

Armed with the Court's suggestions from *Reno*, Congress immediately began considering proposals for new Internet legislation.¹³ Congress remedied many of the problems the Court found with the CDA, and in 1998 created the Child Online Protection Act (COPA).¹⁴ Several plaintiffs immediately challenged COPA as violating the First Amendment rights of Internet speakers.¹⁵ COPA trudged through the courts, and reached the Supreme Court for a second time in 2004.¹⁶ On July 29, 2004, in a five-to-four decision, the

8. 47 U.S.C. § 223 (2000). President Clinton signed the CDA into law on Feb. 8, 1996. *ACLU*, 929 F. Supp. at 826–27. The CDA composes Title V of the Telecommunications Act of 1996. *Id.*

9. 47 U.S.C. § 223(a), (d). Some blame the *Time* magazine article "On a Screen Near You: Cyberporn" of enraging the public and fueling Congress to enact the CDA. Yaman Akdeniz, *Governing Pornography & Child Pornography on the Internet: The UK Approach*, 32 *UWLA L. REV.* 247, 247 n.2 (2001); Norman Solomon, *How Time Magazine Promoted a Cyberhoax*, *ALTERNET*, Apr. 26, 2000, <http://www.alternet.org/columnists/story/8744/>. The *Time* article declared that 83.5% of images stored on Usenet groups were pornographic and reported that viewing pornographic material is one of the largest recreational computer uses. Philip Elmer-Dewitt, *On a Screen Near You: Cyberporn*, *TIME*, July 3, 1995, at 38. Three weeks later *Time* retracted the article, stating that the study it was based on "grossly exaggerated the extent of pornography on the Internet" and included statistics that were "misleading or meaningless." Philip Elmer-Dewitt, *Fire Storm on the Computer Nets*, *TIME*, July 24, 1995, at 57.

10. 929 F. Supp. at 827 & n.2.

11. *Reno v. ACLU*, 521 U.S. 844, 874, 882, 884 (1997).

12. *Id.* at 864–86.

13. *See ACLU v. Reno*, 31 F. Supp. 2d 473, 476–77 (E.D. Pa. 1999) (stating that Congress tried to remedy the CDA with new legislation).

14. Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified as 47 U.S.C. § 231 (2000)). COPA has been dubbed "the son of the CDA" due to the similarities between the two statutes. *See, e.g.*, Golden Gate University Library, *The Sons of the CDA: Filtering the Internet by Law*, http://internet.ggu.edu/university_library/if/son_of_cda.html (last visited Sept. 17, 2005).

15. *Reno*, 31 F. Supp. 2d at 476.

16. *Ashcroft v. ACLU* 542 U.S. 656 (2004).

Court found that COPA violated the First Amendment despite Congress's compliance with the Court's suggestions in *Reno*.¹⁷ Again, however, the Court reiterated that constitutional legislation could be effected.¹⁸ Rather than strike COPA down as unconstitutional, the Court remanded it for a full trial based on new evidence regarding the Internet, COPA, and the Web.¹⁹ Should the government press the legislation, the remand will mark the sixth time a court has considered COPA.²⁰

Today, Congress is left with the Court's seemingly inconsistent decisions and what might seem an empty promise that protective legislation is possible. To put the issues inherent in Internet legislation into context, Part II of this comment will summarize the history of obscenity and indecency law. Part III will examine a case in which the Court upheld federal Internet legislation, *United States v. American Library Association*.²¹ Part IV will review the Court's decisions regarding the CDA and COPA and carefully consider the differences between these two acts. Part V will propose a solution to COPA's First Amendment pitfalls and consider whether Congress should attempt to enact such legislation, should COPA ultimately fail. Additionally, Part V will consider other ways that Congress can protect children from harmful Internet materials. Part VI concludes that Congress will not be able to create COPA-like legislation that is both constitutional and effective, although it may be able to attain its goal of protecting children from Internet pornography through other means.

II. HISTORY

A. *Obscenity and Indecency Law*

1. Obscenity Law

The First Amendment to the Constitution states that "Congress shall make no law . . . abridging the freedom of speech . . ."²² Although it might seem that the First Amendment is composed of "plain words, easily understood,"²³

17. *Id.* at 660–61, 673.

18. *Id.* at 672–73.

19. *Id.*

20. The COPA cases in chronological order are: *ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999); *ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000); *Ashcroft v. ACLU*, 535 U.S. 564 (2002); *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003); *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

21. 539 U.S. 194 (2003).

22. U.S. CONST. amend. I.

23. MADELEINE SCHACHTER, *LAW OF INTERNET SPEECH* 3 (2d ed. 2002) (quoting Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865, 874 (1960)). Justice Black has been deemed an "absolutist" for his belief that the First Amendment's language demands total protection for all

the Supreme Court has never interpreted the First Amendment in such an absolute manner. Rather, the Court has traditionally sought to strike a balance between free expression and interests that necessitate protection. Entire categories of speech, such as child pornography,²⁴ libel,²⁵ and “fighting words,”²⁶ have been categorically denied the protections of the First Amendment as a result of the Court’s balance. Thus, one may be civilly or criminally liable for these types of speech despite the First Amendment.

Obscenity is another category of speech that does not receive First Amendment protection.²⁷ Some claim that obscenity should not be protected because of its “dangerous effect on susceptible populations;” others claim that lewd expression should not contaminate other, more valuable speech.²⁸ The Court, in balancing the value of free expression against its harm, has found that obscenities serve “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”²⁹

The Court’s proclamation that the First Amendment does not protect obscene speech was the easy part. The Court’s next step was to determine what the term “obscenity” really meant. Due process requires not only that the law define obscenity, but also that its definition give unambiguous notice to speakers whose material may fall within its meaning.³⁰ Justice Brennan voiced his concern that obscenity was impossible to define with “sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials.”³¹ He further stated that failure to precisely define obscenity could result in the “substantial erosion of protected speech as a

speech “without any ‘ifs’ or ‘buts,’ or ‘whereases.’” *Id.* (quoting *Beauharnais v. Illinois*, 343 U.S. 250, 275 (1952) (Black, J., dissenting)).

24. *New York v. Ferber*, 458 U.S. 747, 752, 765 (1982). In upholding a statute that banned the distribution of material depicting minors engaging in sexual performances, the Court found the value of the speech at issue “exceedingly modest” in comparison to the state’s interest in “safeguarding the physical and psychological well-being of a minor.” *Id.* at 762, 756–57 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)).

25. *See Konigsberg v. State Bar*, 366 U.S. 36, 49 n.10 (1961).

26. “Fighting words” are defined as “face-to-face insults that will likely provoke a reasonable person to violence.” JOHN F. WIRENIUS, *FIRST AMENDMENT, FIRST PRINCIPLES: VERBAL ACTS AND FREEDOM OF SPEECH* 101 (rev. ed. 2004). This category of unprotected speech is strictly limited, but does still exist. *Id.*; *see, e.g., Virginia v. Black*, 538 U.S. 343, 362–63 (2003) (finding that a state ban on cross-burning with the intent to intimidate does not violate the First Amendment); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

27. *Miller v. California*, 413 U.S. 15, 21 (1973).

28. *See NAN LEVINSON, OUTSPOKEN: FREE SPEECH STORIES* 146 (2003).

29. *Miller*, 413 U.S. at 20–21 (citing *Roth v. United States*, 354 U.S. 476, 485 (1957)).

30. *See id.* at 27.

31. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 103 (1973) (Brennan, J., dissenting).

byproduct of the attempt to suppress unprotected speech.”³² In other words, speakers that are not sure whether their speech amounts to obscenity might choose silence in the face of civil or criminal liability.

The Court has struggled to define obscenity from the beginning. The first definition of obscenity recognized in America originated from the 1868 English case *The Queen v. Hicklin*.³³ In *Hicklin*, an English man named Henry Scott was convicted of violating an anti-obscenity act.³⁴ Scott distributed an anti-Catholic publication entitled “The Confessional Unmasked,” which included a discussion of “Questions Put to Females in Confession.”³⁵ On appeal, the Court of Queen’s Bench found that Scott’s publication did, in fact, violate the anti-obscenity act and adopted the following definition of obscenity: “whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.”³⁶ In addition to defining obscenity, *Hicklin* gave two standards to detect it. The first standard deemed materials obscene based on how they were perceived by the most susceptible of people, such as a children; the second examined materials in isolated passages, rather than as a whole work.³⁷ In 1896, America adopted *Hicklin*’s obscenity standards.³⁸

The *Hicklin* standard, though criticized for denying protection to a wide range of speech,³⁹ defined obscenity in the United States until *Roth v. United States* reached the Supreme Court in 1957.⁴⁰ In *Roth*, a New York publisher was convicted of violating a federal law that prohibited the mailing of obscene materials.⁴¹ The majority reiterated that obscene speech is not constitutionally protected and stated the following:

All ideas having even the slightest redeeming social importance . . . have the full protection of the guaranties [of the First Amendment], unless excludable because they encroach upon the limited area of more important interests. But

32. *Id.*; see also Michael Kahn, *Bulls in the China Shop: Obscenity Law in America*, 5 BELLES LETTRES: A LITERARY REV. 23, 23 (Dec. 2004–Feb. 2005).

33. *The Queen v. Hicklin*, [1868] L.R. 3 Q.B. 360; see also THOMAS L. TEDFORD, FREEDOM OF SPEECH IN THE UNITED STATES 133–34 (2d ed. 1993).

34. TEDFORD, *supra* note 33, at 133.

35. Kahn, *supra* note 32, at 23.

36. *Hicklin*, L.R. 3 Q.B. at 371.

37. See Kahn, *supra* note 32, at 23.

38. *Id.* (referring to the Supreme Court’s approach in *Rosen v. United States*, 161 U.S. 29 (1896)).

39. In a 1913 obscenity case, Judge Learned Hand argued that the *Hicklin* test protected only materials deemed appropriate for a “child’s library.” TEDFORD, *supra* note 33, at 134 (citing *United States v. Kennerley*, 209 F. 119, 121 (1913)).

40. 354 U.S. 476, 484 (1957).

41. *Id.* at 480.

implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.⁴²

The Court further emphasized that “sex and obscenity are not synonymous,” and called obscenity “material which deals with sex in a manner appealing to prurient interest.”⁴³ The Court declared that the First Amendment protects sexual content in art, literature, and scientific works.⁴⁴

The majority then articulated its new test: “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”⁴⁵ This new test revised *Hicklin*’s obscenity standard in two ways.⁴⁶ First, *Roth* required courts to consider the material in question as a whole, rather than in isolated passages, as *Hicklin* had required.⁴⁷ Second, the *Roth* test measured obscenity by the values of the “average” person, rather than by “particularly susceptible” persons.⁴⁸

However, the obscure words with which the Court defined obscenity in *Roth*, such as “worthless,” “prurient,” and “contemporary community standards,” did little to create a comprehensible definition of obscenity.⁴⁹ Throughout the remainder of the 1950s and 1960s, “[t]he predictable result [of obscenity cases] was unpredictability.”⁵⁰ Justice Potter Stewart best summed up the Court’s dilemma when he stated, “I could never succeed in intelligibly [defining obscenity]. But I know it when I see it”⁵¹

Sixteen years later, the Court again sought to clarify its definition of obscenity. *Miller v. California*⁵² provided the opportunity and led the Court to create today’s obscenity standard. In *Miller*, the defendant was convicted of mailing unsolicited advertisements for pornographic books to a mother and her son in violation of state law.⁵³ Seeing its opportunity to revise *Roth*, the Court handed down its new test, defining material as “obscene” if:

42. *Id.* at 484.

43. *Id.* at 487.

44. *Id.*

45. *Roth*, 354 U.S. at 489.

46. Kahn, *supra* note 32, at 24.

47. *Id.*

48. *Id.*

49. “Over the next several years, the judges of the Supreme Court learned that their definition of obscenity was not clear to others. Furthermore, they found that they rarely agreed among themselves about the meaning of their own words.” TEDFORD, *supra* note 34, at 138.

50. Kahn, *supra* note 32, at 24. “Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States’ police power.” *Miller v. California*, 413 U.S. 15, 22 (1973). See generally *Redrup v. New York*, 386 U.S. 767 (1967).

51. Kahn, *supra* note 32, at 23 (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964)).

52. *Miller*, 413 U.S. at 24.

53. *Id.* at 16–18.

(a) . . . the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest . . . (b) . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁵⁴

The *Miller* test altered the *Roth* test in several important ways. While keeping the “contemporary community standards” language of *Roth*, the Court in *Miller* interpreted the language to refer to state rather than national standards.⁵⁵ Thus, the new standard allowed states to adopt their own standards of obscenity. The *Miller* test also required state legislatures to specifically define material that its anti-obscenity statutes would ban.⁵⁶ Further, the Court found that material does not have to be “utterly without redeeming social value” as *Roth* required.⁵⁷ Even if the material has some social value, states now had the authority to treat it as obscene.

Because speech that meets *Miller*’s obscenity test is not protected by the First Amendment, Congress can legislate, ban, or criminalize such speech without First Amendment concerns.⁵⁸ Indeed, Congress has criminalized selling, mailing, importing, and transporting obscenity, as well as the broadcast of obscenity over the airwaves or on cable television.⁵⁹ Although there is no question that Congress is authorized to regulate obscenity, this authority has been difficult to implement where the Internet is concerned. Parts III and IV will examine Congress’ struggles in detail.

B. Indecency Law

In *Reno* the Court stated that “[i]n evaluating the free speech rights of adults, we have made it perfectly clear that ‘[s]exual expression which is

54. *Id.* at 24 (citations omitted).

55. *Id.* at 24, 31–33. The *Miller* Court further stated that “[n]othing in the First Amendment requires that a jury must consider hypothetical and unascertainable ‘national standards’” *Id.* at 31. “It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.” *Id.* at 32. The “contemporary community standards” test has received a great deal of criticism. In the case of the Internet, where the speaker reaches a nationwide audience, the definition of obscenity is determined by the standards of the most conservative community with Internet access. *Reno v. ACLU*, 521 U.S. 844, 877–78 (1997); see also WIRENIUS, *supra* note 26, at 94.

56. *Miller*, 413 U.S. at 24.

57. *Id.*

58. *Id.* at 23, 27.

59. Emily Vander Wilt, Comment, *Considering COPA: A Look at Congress’s Second Attempt to Regulate Indecency on the Internet*, 11 VA. J. SOC. POL’Y & L. 373, 383 (2004) (citing 18 U.S.C. §§ 1460–1468, 1470 (2000)).

indecent but not obscene is protected by the First Amendment.”⁶⁰ Also difficult to define, the term “indecent” includes speech that “borders on obscenity” as well as speech that is explicit, but that has literary, artistic, scientific, or political value, or that otherwise falls short of *Miller*’s obscenity test.⁶¹ Indecency has been described in many different ways, such as “sexually explicit,”⁶² “lewd or lascivious, obscene or grossly vulgar, unbecoming, unseemly, unfit to be seen or heard, or [speech that otherwise] violates the proprieties of language or behavior,”⁶³ and as speech that contains “patently offensive references to excretory and sexual organs and activities.”⁶⁴ Although courts and legislatures have tried to define the term, the definitions are often as subjective and vague as the term “indecent” itself.

Indecent speech is provided First Amendment protection; nevertheless, it has little social worth “in the hierarchy of First Amendment values.”⁶⁵ This lowered value is the basis for the Court’s finding that the government can regulate indecent speech, in some instances, despite the First Amendment. Regulations based on the nature of speech are considered “content-based” regulations.⁶⁶ The Court views government regulations based on the content of the speaker’s message among the most repressive and subjects such regulations to strict scrutiny analysis.⁶⁷ Under strict scrutiny analysis, the government can employ content-based regulations on protected speech only if the regulations are narrowly tailored to meet a compelling government interest and no other less restrictive means are available to achieve the government interest.⁶⁸

Although the Court has not provided a clear definition of “indecent,” it has created indecency doctrines that provide more or less First Amendment protection based on the medium the speaker uses.⁶⁹ Broadcast media, for

60. *Reno*, 521 U.S. at 874 (quoting *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

61. Patrick M. Garry, *The Flip Side of the First Amendment: A Right to Filter*, 2004 MICH. ST. L. REV. 57, 79 (citing *Alliance for Cmty. Media v. FCC*, 56 F.3d 105, 130 (D.C. Cir. 1995)).

62. See Wilt, *supra* note 59, at 385.

63. 50 AM. JUR. 2D *Lewdness, Indecency, and Obscenity* § 2 (1995) (citing *Commonwealth v. Buckley*, 86 N.E. 910 (Mass. 1909), *People v. Eastman*, 81 N.E. 459 (N.Y. 1907), and *Commonwealth v. Blumenstein*, 133 A.2d 865 (Pa. Super. Ct. 1957), *rev’d on other grounds*, 153 A.2d 227 (Pa. 1959)).

64. *FCC v. Pacifica Found.*, 438 U.S. 726, 743 (1978).

65. *Id.* at 746.

66. See Ivan Hare, *Method and Objectivity in Free Speech Adjudication: Lessons From America*, 54 INT’L & COMP. L.Q. 49, 51 (2005).

67. See, e.g., *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004) (“Content-based prohibitions . . . have the constant potential to be a repressive force in the lives and thoughts of a free people.”); *U.S. v. Playboy Entm’t Group*, 529 U.S. 803, 813 (2000); *Reno v. ACLU*, 521 U.S. 844, 874 (1997); *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

68. See, e.g., *Reno*, 521 U.S. at 874.

69. *Pacifica*, 438 U.S. at 748; *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969); Garry, *supra* note 61, at 80. For an in-depth explanation of media-based protection of indecent

example, receives the lowest level of First Amendment protection.⁷⁰ The Court has reasoned that the pervasive nature of broadcast media, such as television and radio, justifies a lesser protection.⁷¹ It has stated that “prior warnings cannot completely protect the listener To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.”⁷² Print media, on the other hand, receives almost unlimited First Amendment protection.⁷³ The Court has stated that “[a] responsible press is an undoubtedly desirable goal,” although not constitutionally mandated.⁷⁴

Telecommunications and cable speech, like print speech, receive a heightened level of protection. Telephone speech in the form of pre-recorded explicit messages, also known as “dial-a-porn,” has sparked the most controversy. In the landmark decision *Sable Communications of California v. FCC*,⁷⁵ the Court considered the constitutionality of Communications Act amendments that absolutely banned obscene and indecent prerecorded messages.⁷⁶ The Court held that an absolute ban on indecent speech would violate the First Amendment by denying adults their right to engage in protected speech and would result in “limiting the content of adult telephone conversations to that which is suitable for children to hear.”⁷⁷ Furthermore, hearing an explicit message requires taking the “affirmative steps” of dialing a

speech, see Bradley J. Stein, Comment, *Why Wait? A Discussion of Analogy and Judicial Standards for the Internet in Light of the Supreme Court’s Reno v. ACLU Opinion*, 42 ST. LOUIS U. L.J. 1471 (1998).

70. *Pacifica*, 438 U.S. at 748. In *Pacifica*, the defendant radio station aired George Carlin’s aptly entitled comedy routine, “Filthy Words.” *Id.* at 729–30. The Court upheld the FCC’s finding that the broadcast was indecent and that its prohibition was consistent with the First Amendment. *Id.* at 731–32, 748–51. See generally MATTHEW L. SPITZER, SEVEN DIRTY WORDS AND SIX OTHER STORIES 119–30 (1986).

71. *Pacifica*, 438 U.S. at 748–49.

72. *Id.* at 49.

73. See *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256–58 (1974). In *Miami Herald*, the Supreme Court considered whether a Florida statute that required newspapers to grant political candidates equal space, at no cost, to reply to criticism violated the First Amendment. *Id.* at 244–45. The Court emphasized that print speech receives the highest level of First Amendment protection and stated:

The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Id. at 258.

74. *Id.* at 256.

75. *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989).

76. *Id.* at 118.

77. *Id.* at 131.

“1-900 number,” unlike broadcast media where one must simply turn on the television.⁷⁸ The Court also found telephone speech less pervasive than broadcast and declined to reduce its First Amendment protection.⁷⁹

The Court has regarded speech in cable media as “[t]he closest precedent” to Internet speech, and, tellingly for the future of the Internet, has provided it a heightened level of protection.⁸⁰ In the recent decision *United States v. Playboy Entertainment Group, Inc.*, the Court examined section 505 of the Telecommunications Act.⁸¹ Congress created the Act to protect children from imprecise scrambling that sometimes allowed discernable sounds or images to reach viewers.⁸² The Act required cable providers to either scramble sexually explicit channels in full or to limit explicit programming to hours when children would be less likely to see them.⁸³

The Court in *Playboy* found that the Act restricted speech based on its content and applied its strict scrutiny test.⁸⁴ Cable television allows viewers the option to block the transmission of unwanted channels, unlike broadcast media.⁸⁵ The Court found that this alternative clashed with the government’s argument that the Act was the least restrictive means available to meet its purpose.⁸⁶ Thus, the Court held the Act restricted protected speech in violation of the First Amendment.⁸⁷

III. PREVIOUS FEDERAL INTERNET LEGISLATION AND THE COURT

In addition to understanding obscenity and indecency law, it is important to consider the Court’s previous rulings regarding Internet legislation to better predict where Internet regulation may be headed. In response to the increasing number of library patrons, including minors, accessing Internet pornography from public libraries, Congress passed the Children’s Internet Protection Act of 2000 (CIPA).⁸⁸ CIPA provided that a public school or library may not receive federal assistance to provide Internet access unless it installs software to block

78. *Id.* at 127–28.

79. *Id.* at 128, 130–31.

80. *See* Ashcroft v. ACLU, 542 U.S. 656, 670 (2004).

81. *United States v. Playboy Entm’t Group*, 529 U.S. 803, 806 (2000).

82. *Id.*

83. *Id.* To comply with the statute, most cable operators eliminated the transmission of indecent programming between 6 a.m. and 10 p.m. *Id.* at 806–07. “[F]or two-thirds of the day no household in those service areas could receive the programming, whether or not the household . . . wanted to do so.” *Id.* at 807.

84. *Id.* at 813.

85. *Id.* at 815.

86. *Playboy*, 529 U.S. at 815–16.

87. *Id.* at 827.

88. Pub. L. No. 106-554, 114 Stat. 2763A–335 (codified at 47 U.S.C. § 254 (2000) and various sections of 20 U.S.C.).

images that constitute obscenity or child pornography.⁸⁹ Several plaintiffs, including groups of public libraries, library associations, library patrons, and Web publishers, challenged the Act in *United States v. American Library Ass'n*.⁹⁰ Plaintiffs claimed, among other things, that CIPA induced libraries to violate the First Amendment rights of adult library patrons.⁹¹ In a plurality opinion, the Supreme Court disagreed.⁹²

In its opinion, the Court first considered the level of scrutiny it should apply to CIPA and chose not to apply heightened scrutiny because “public libraries seek to provide materials ‘that would be of the greatest direct benefit or interest to the community,’”⁹³ rather than “a public forum for Web publishers to express themselves.”⁹⁴ Next, the Court emphasized that CIPA would affect only federal funds intended to assist libraries in obtaining educational and informational material.⁹⁵ The Court found that Congress could condition receipt of funds on whether they are used in the manner anticipated and authorized.⁹⁶

Although the blocking software CIPA required sometimes filtered out protected material, this flaw was not fatal.⁹⁷ CIPA permitted patrons that wished to disable filters to do so on request.⁹⁸ A final point made by the Court

89. § 1712, 114 Stat. at 2763A–340.

90. 539 U.S. 194 (2003).

91. *Id.* at 210.

92. *Id.* at 214. Before CIPA reached the Supreme Court, the United States District Court for the Eastern District of Pennsylvania held CIPA to violate the First Amendment. *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 490 (E.D. Pa. 2002), *rev'd*, 539 U.S. 194 (2003). The district court found that the Act was not narrowly tailored and that less-restrictive alternatives existed. *Id.* at 475–84. The finding largely resulted from evidence that suggested filtering technology is often “underblocking” or “overblocking,” and likely to either fail to filter out explicit material or to block protected material. *Id.* at 476–77.

93. *Library Ass'n*, 539 U.S. at 204 (quoting *Library Ass'n*, 201 F. Supp. 2d at 421).

94. *Library Ass'n*, 539 U.S. at 206. The Court emphasized that a public library is not a public forum, and Internet services in libraries are not intended to aid in the free expression of Web providers. *Id.* Rather, the Internet is a technological extension of the books intended “to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality.” *Id.*

95. *Id.* at 211–12. The Library Services and Technology Act (LSTA) is one program that provides public funding. *Id.* at 211 n.5. LSTA’s goal is to encourage excellence and promote patrons’ access to library resources. *Id.* Another program, E-rate, is intended to allow patrons to access a variety of different resources. *Id.*

96. *Id.* at 214.

97. *See id.*

98. *Id.* at 209. However, libraries would not unblock a site unless it was for “bona fide research or other lawful purposes,” even for an adult. *Id.* (quoting 20 U.S.C. § 9134(f)(3) (2000)). The district court viewed this as inadequate because embarrassment could discourage patrons from doing so. *Id.* The Supreme Court disagreed with the district court’s finding, stating that “the Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment.” *Id.*

was that CIPA, unlike COPA or the CDA, did not criminalize the failure to follow its guidelines.⁹⁹ Rather, the Act merely withheld federal funds if its requirements were not met.¹⁰⁰

IV. HEIGHTENED PROTECTION FOR INTERNET SPEECH: *RENO* AND *ASHCROFT*

Reno has been called the first decision to “define the legal boundaries of free expression in the age of the Internet.”¹⁰¹ Although the CDA ultimately failed, the Court’s decision in *Reno* led the way for the later creation of COPA.¹⁰² This Section will explain the terms of the CDA and why the Court found it inconsistent with First Amendment rights. Section B will detail how Congress remade the CDA and created COPA, in a second attempt to protect children from harmful Internet speech. Finally, Section C will follow COPA’s journey through the courts.

A. *The Communications Decency Act: Reno v. ACLU*

1. The CDA

On February 8, 1996, President Clinton signed the Telecommunications Act of 1996 into effect.¹⁰³ Although much of the Act was aimed at promoting competition in the telephone service market, Title V, the CDA, addressed Congress’s concern with the accessibility of indecent Internet communications to minors.¹⁰⁴ The CDA was enacted without extensive hearings or commission reports, unlike other portions of the Telecommunications Act.¹⁰⁵

99. *See Library Ass’n*, 539 U.S. at 212.

100. *Id.*

101. *See* JEREMY HARRIS LIPSCHULTZ, *FREE EXPRESSION IN THE AGE OF THE INTERNET: SOCIAL AND LEGAL BOUNDARIES* 98 (2000).

102. *See supra* notes 13–14 and accompanying text.

103. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 223(a)-(h) (2000)); *see also* *ACLU v. Reno*, 929 F. Supp. 824, 827 & n.1 (E.D. Pa. 1996).

104. *ACLU*, 929 F. Supp. at 826–27.

105. *Reno v. ACLU*, 521 U.S. 844, 858 (1997). In a one-day hearing on “Cyberporn and Children,” Senator Leahy remarked:

It really struck me . . . that it is the first ever hearing And yet we had a major debate on the floor, passed legislation overwhelmingly on a subject involving the Internet, legislation that could dramatically change—some would say even wreak havoc—on the Internet. The Senate went in willy-nilly, passed legislation, and never once had a hearing, never once had a discussion other than an hour or so on the floor.

Id. at 858 n.24 (citing *Cyberporn and Children: The Scope of the Problem, The State of the Technology, and the Need for Congressional Action: Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 7-8 (1995) (statement of Sen. Leahy, Member, S. Comm. on the Judiciary)).

The CDA, in an attempt to protect minors from harmful Internet material, contained an “indecent transmission” provision and a “patently offensive display” provision. The indecent transmission provision, contained in § 223(a), prohibited the knowing transmission of obscene or indecent messages to a recipient under 18 years of age.¹⁰⁶ The patently offensive display provision, § 223(d), prohibited the knowing sending or displaying of patently offensive messages so as to make it available to a person under 18 years of age.¹⁰⁷

Under the CDA, Internet speakers that knowingly sent or posted prohibited material could be fined, imprisoned for up to two years, or both.¹⁰⁸ However, the Act also included two affirmative defenses. If a speaker could prove that he had taken “good faith, reasonable, effective and appropriate actions under the circumstances” to keep minors from accessing the communication or that he required age verification by credit card or an adult verification number before transmitting offensive material, he could then avoid the CDA’s penalties.¹⁰⁹

106. Communications Decency Act, 47 U.S.C. § 223(a) (2000). The Act provides, in pertinent part:

(a) Whoever—(1) in interstate or foreign communications . . . (B) by means of a telecommunications device knowingly—(i) makes, creates, or solicits, and (ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication . . . (E) . . . (2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined . . . or imprisoned not more than two years, or both.

Id.

107. *Id.* § 223(d) (2000). This section states:

(d) Whoever—(1) in interstate or foreign communications knowingly—(A) uses an interactive computer service to send to a specific person or persons under 18 years of age . . . (B) . . . any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication . . . shall be fined . . . or imprisoned not more than two years, or both.

Id.

108. *Id.* § 223 (a), (d).

109. *Id.* § 223 (e). This section provides:

(5) It is a defense . . . that a person—(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication . . . or (B) has restricted access to such communication by requiring use of a verified credit card . . . or adult personal identification number.

Id.

2. The District Court Considers the CDA

Immediately after President Clinton signed the CDA into effect, twenty plaintiffs, including non-profit organizations and free speech advocates, challenged the constitutionality of the Act.¹¹⁰ The Eastern District of Pennsylvania heard *ACLU v. Reno* and considered whether to grant the plaintiffs' request for a preliminary injunction.¹¹¹ The court began by making extensive findings of fact regarding computers, the Internet and the CDA.¹¹² The court found Internet speech to be "as diverse as human thought."¹¹³ On the Internet, the court found, one can be both a speaker and a member of the audience, and reach a wide audience at little cost.¹¹⁴ A three-judge panel wrote three separate opinions and granted the injunction.¹¹⁵

Chief Judge Sloviter subjected the Act to strict scrutiny, likening the CDA's regulations to those in telecommunications cases, such as *Sable*.¹¹⁶ The judge concluded that the Act "sweeps more broadly than necessary and thereby chills the expression of adults," and that the terms "patently offensive" and "indecent" were inherently vague.¹¹⁷ The judge further found that the CDA's affirmative defenses were neither technologically nor economically feasible for many Internet speakers, and therefore, were not narrowly tailored to meet strict scrutiny analysis.¹¹⁸ Thus, the CDA was unconstitutional.¹¹⁹

Judge Buckwalter concluded that the terms "patently offensive," "indecent," and "in context" were unconstitutionally vague; thus, the criminal enforcement of either section would implicate the First and Fifth Amendments.¹²⁰ He was particularly troubled by the regulation of indecent material, as indecency may not be devoid of literary, artistic, political, or

110. *ACLU v. Reno*, 929 F. Supp. 824, 8227 (E.D. Pa. 1996). Plaintiffs included organizations such as Stop Prisoner Rape, AIDS Education Global Information System, and Planned Parenthood Foundation of America, Inc., but no commercial pornographers. *Id.* at 825–27 & n.2. A second suit was later filed by twenty-seven additional plaintiffs, including the American Library Association, Microsoft Corporation, and Health Sciences Libraries Consortium. *Reno v. ACLU*, 521 U.S. 844, 861–62 & n.28 (1997). Because of the vagueness of the terms, the CDA could have imposed criminal penalties on these organizations because their Web-sites contained material that could be considered "indecent" and "patently offensive," even though their material is educational or informational in nature. *See id.* at 870–72.

111. *ACLU*, 929 F. Supp. at 826.

112. *Id.* at 830–49.

113. *Id.* at 842.

114. *Id.* at 842–44.

115. *Id.* at 826, 849, 857, 865, 883.

116. *ACLU*, 929 F. Supp. at 851. *See* discussion of telecommunications media and indecency regulation, *supra* Part II.B.

117. *Id.* at 854, 858.

118. *Id.* at 854.

119. *Id.* at 857.

120. *Id.* at 858.

scientific value, unlike obscenity.¹²¹ Judge Dalzell, on the other hand, found that the “special attributes of Internet communication” denied Congress the power to regulate protected Internet speech.¹²² Thus, although each judge’s opinion rested on different grounds, their conclusions were the same: a resounding “no” to the CDA’s enforcement.

3. The Supreme Court Hears *Reno*

Reno reached the Supreme Court on expedited review.¹²³ The Court, in a 6-3 decision, upheld the district court’s injunction.¹²⁴ Justice Stevens, writing for the Court, began his opinion by considering First Amendment cases dealing with other forms of media and distinguishing them based on both the language of the CDA and the special characteristics of the Internet.¹²⁵

The Court first considered *Ginsberg v. New York*,¹²⁶ a case that upheld a statute that prohibited the sale of obscene material to minors.¹²⁷ The Court found that the CDA swept much more broadly than the statute in *Ginsberg*.¹²⁸ Most importantly, the Court noted that the CDA, unlike the statute in *Ginsberg*, was not limited to commercial transactions.¹²⁹ Further, the CDA differed from the statute in *Ginsberg* in that it lacked the “utterly without redeeming social importance” component of the obscenity definition and failed to define what constituted prohibited indecent speech.¹³⁰ Finally, the Court criticized the fact that the CDA included minors over seventeen years of age within its protected class.¹³¹

The Court went on to reject the government’s contention that *Pacifica*,¹³² which gave a lowered First Amendment protection to broadcast media, should

121. *ACLU*, 929 F. Supp. at 863.

122. *Id.* at 877. The characteristics of the Internet, such as its “low barriers to entry,” and “significant access to all who wish to speak in the medium,” led Judge Dalzell to proclaim that a proper conclusion may be that “Congress may not regulate indecency on the Internet at all.” *Id.*

123. *Reno v. ACLU*, 521 U.S. 844 (1997). The district court case was decided on June 11, 1996. *ACLU*, 929 F. Supp. at 824. The case was argued before the Supreme Court only nine months later on March 19, 1997. *Reno*, 521 U.S. at 844.

124. *Reno*, 521 U.S. at 848–49.

125. *Id.* at 849, 864–71.

126. 390 U.S. 629 (1968). *Ginsberg* arose after the owner of a luncheonette and stationary shop in Bellmore, Long Island, sold a “girlie” magazine to a sixteen-year-old boy. *Id.* at 631. The boy’s mother had asked the boy to buy the magazine in order to demonstrate that minors could purchase such literature from Sam’s. *TEDFORD*, *supra* note 33, at 141. The boy’s mother then turned the shop owner, Sam Ginsberg, over to police. *Id.*

127. *Reno*, 521 U.S. at 865.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 865–66.

132. *FCC v. Pacifica Found*, 438 U.S. 726, 748 (1978). *Pacifica* is discussed *supra* Part I.B.

apply to uphold the CDA.¹³³ The Court distinguished *Pacifica* on three grounds. First, the order upheld in *Pacifica* was made by a regulatory agency that narrowly targeted its order at a specific broadcast, unlike the CDA's "broad categorical prohibitions" that are not "dependent on any evaluation by an agency familiar with the unique characteristics of the Internet."¹³⁴ Second, the order at issue in *Pacifica* was not punitive and did not hold the CDA's harsh penalties.¹³⁵ Finally, the Court emphasized that the CDA does not legislate broadcast media, which has traditionally received the least First Amendment protection.¹³⁶ The Court noted that the Internet varied greatly from other mediums, and found that cases involving other media added nothing to the analysis of free speech and the Internet.¹³⁷

The Court then emphasized the vagueness of the CDA and its potential to chill protected speech.¹³⁸ Echoing the district court's findings, Justice Stevens wrote that the Act's regulation of "patently offensive material" and "indecent transmissions" and its failure to define either term rendered the statute unconstitutionally vague.¹³⁹ Further, "with penalties including up to two years in prison for each act of violation, [t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate."¹⁴⁰ Justice Stevens emphasized the unique nature of the Internet, and stated that "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox."¹⁴¹ Thus, the CDA's ambiguous standards, in combination with its harsh criminal penalties presented "a great[] threat of censoring speech" in this expansive new medium.¹⁴²

The Court further held that the CDA was overbroad,¹⁴³ likening the Act's blanket restrictions to those held unconstitutional in *Sable*.¹⁴⁴ The Court wrote that, "[g]iven the size of the potential audience for most messages, in the absence of a viable age verification process, the sender must be charged with knowing that one or more minors will likely view it."¹⁴⁵ The Court continued: "Knowledge that, for instance, one or more members of a 100-person chat group will be a minor—and therefore that it would be a crime to send the

133. *Reno*, 521 U.S. at 866–67.

134. *Id.* at 867.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Reno*, 521 U.S. at 873–74.

139. *Id.* at 873.

140. *Id.* at 872.

141. *Id.* at 870.

142. *Id.* at 874.

143. *Reno*, 521 U.S. at 877. "The breadth of the CDA's coverage is wholly unprecedented."
Id.

144. *Id.* at 875.

145. *Id.* at 876.

group an indecent message—would surely burden communication among adults.”¹⁴⁶ Without technology to allow adults, but not minors, to access such messages, the CDA’s burden was too heavy. Moreover, the CDA’s broad scope would criminalize indecent speech that is protected for adults, such as discussions regarding sexually transmitted diseases, prison rape, abortion,¹⁴⁷ and other valuable but indecent Internet speech, whether commercial or otherwise.

The Court further concluded that the Act was not narrowly tailored to meet the government’s interest.¹⁴⁸ Plaintiffs maintained that filtering software or tagging would allow parents to control the Internet materials that their children could access.¹⁴⁹ Moreover, the age verification and adult identification numbers that constitute an affirmative defense to the CDA would not be economically feasible for most noncommercial speakers and would not prevent minors from posing as adults.¹⁵⁰ The Court ultimately found that the CDA placed an unreasonable burden on speech, and that its affirmative defenses were not narrowly tailored to save the “otherwise patently invalid unconstitutional provision.”¹⁵¹

B. *The Child Online Protection Act: Ashcroft v. ACLU*

1. The CDA Becomes COPA

The Supreme Court declared the CDA unconstitutional on June 26, 1997.¹⁵² Within five months, a determined Congress began considering proposals for a new Internet protection bill.¹⁵³ This time Congress carefully

146. *Id.*

147. *Id.* at 874–75, 878. “In evaluating the free speech rights of adults, we have made it perfectly clear that ‘[s]exual expression which is indecent but not obscene is protected by the First Amendment.’” *Id.* (quoting *Sable Comm’n of Cal. v. FCC*, 492 U.S. 115, 126 (1989)).

148. *Reno*, 521 U.S. at 879.

149. *Id.* at 881. “Tagging” refers to the requirement that an Internet speaker electronically designate his or her speech as indecent, thus allowing screening software to detect and block the material. *Id.* The government argued that tagging would constitute “good faith, reasonable, effective, and appropriate actions” under the affirmative defense portion of the act. *Id.* This did not save the CDA, however, as screening software did not exist at the time of trial, nor was it shown that such software would be effective if it did exist. *Id.*

150. *Id.* at 881–82.

151. *Id.* at 882. The Court remarked that the CDA’s overbreadth and restriction on adult speech to protect minors amounted to “burn[ing] the house to roast the pig.” *Id.* (quoting *Sable Comm’n of Cal. v. FCC*, 492 U.S. 115, 127 (1989)). In response to the Court’s decision, U.S. Sen. Patrick Leahy has remarked: “The Supreme Court has made clear that we do not forfeit our First Amendment rights when we go online. This decision is a landmark in the history of the Internet and a firm foundation for its future growth.” LIPSCHULTZ, *supra* note 101, at 98.

152. *Reno*, 521 U.S. at 844.

153. Wilt, *supra* note 59, at 378.

aligned its legislation with the *Reno* decision.¹⁵⁴ The Senate Committee on Commerce, Science and Transportation conducted two hearings on harmful Internet materials, to some extent in response to the Court's criticism for its failure to do so before passing the CDA.¹⁵⁵ A new bill made its way through Congress.¹⁵⁶ Within the year, President Clinton signed the Child Online Protection Act into law.¹⁵⁷

COPA imposed as much as \$50,000 in fines and six months in prison on Web publishers who knowingly posted Internet material that was both harmful to minors and posted for commercial purposes.¹⁵⁸ COPA borrowed its definition of "material that is harmful to minors" from *Miller's* three-prong obscenity test:

The term "material that is harmful to minors" means any communication . . . that is obscene or that—

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to . . . the prurient interest;

(B) depicts . . . in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 379.

158. 47 U.S.C. § 231(a) (2000). The Act states:

(1) Prohibited conduct

Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than \$50,000, imprisoned not more than 6 months, or both.

(2) Intentional violations

In addition to the penalties under paragraph (1), whoever intentionally violates such paragraph shall be subject to a fine of not more than \$50,000 for each violation. . . .

(3) Civil penalty

In addition to the penalties under paragraphs (1) and (2), whoever violates paragraph (1) shall be subject to a civil penalty of not more than \$50,000 for each violation. . . .

Id. A person acts for commercial purposes only if "such person is engaged in the business of making such communications." § 231(e)(2)(A). "Engaged in business" means that "the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities." § 231(e)(2)(B).

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.¹⁵⁹

COPA, like the CDA, set forth affirmative defenses.¹⁶⁰ Under the Act, a Web publisher that required a credit card or other adult verification before granting access to the site or used other reasonable means to verify a user's age would escape COPA's criminal and civil penalties.¹⁶¹

At first glance, COPA and the CDA appear similar. Both regulate indecent materials on the Internet, stiffly penalize those who violate their regulations and provide some speakers with an affirmative defense.¹⁶² However, Congress made three important changes when it reinvented the CDA. First, it limited COPA to commercial speech.¹⁶³ In *Reno*, the Court repeatedly suggested that regulation of commercial Web sites would pass First Amendment scrutiny.¹⁶⁴ In finding the CDA unconstitutional, the majority distinguished the Act from *Ginsberg* based, in part, on the fact that the Act upheld in *Ginsberg* regulated only commercial entities.¹⁶⁵ In *Reno*, the Court also discussed the effects of forcing non-commercial Web publishers to require a credit card or password before allowing entry onto their sites due to the cost of doing so.¹⁶⁶ The Court stated that such an imposition on non-commercial sites would impose substantial costs on such Web sites and would require many to shut down.¹⁶⁷ It seemed the Court would hold regulations of commercial sites to a lower standard.

Secondly, COPA applied only to materials displayed on the World Wide Web, and exempted material found in e-mails and chatrooms.¹⁶⁸ The CDA was extremely broad in that it regulated all Internet speech.¹⁶⁹ The Court in *Reno* was particularly concerned that speakers would be unable to verify the ages of those that received messages in chat rooms and other open Internet

159. § 231(e)(6); *Miller v. California*, 413 U.S. 14, 24–25 (1973).

160. COPA provides the following affirmative defenses:

It is an affirmative defense . . . that the defendant, in good faith, has restricted access by minors to material that is harmful to minors—

(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;

(B) by accepting a digital certificate that verifies age; or

(C) by any other reasonable measures that are feasible under available technology.

§ 231(c)(1).

161. See §§ 231 (COPA), 223 (CDA).

162. § 231.

163. §§ 231(a)(1), 223(a).

164. See *Reno v. ACLU*, 521 U.S. 844, 877 (1997).

165. *Id.*

166. *Id.* at 856.

167. *Id.*

168. See § 231(a).

169. See § 223(a).

forums.¹⁷⁰ A speaker's knowledge that "one or more members of a 100-person chat group will be a minor" would make that speaker liable under the CDA for an indecent message he or she sends.¹⁷¹ The district court had previously determined that there "is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups or chat rooms."¹⁷² Thus, the CDA would chill such indecent speech that is protected as to adults.¹⁷³ COPA remedied this problem. Through commonly used technology, Web publishers would be able to require age verification or passwords before allowing entry onto their Web sites.¹⁷⁴

Finally, Congress changed the CDA's language. The CDA regulated "indecent" and "patently offensive" material.¹⁷⁵ The CDA did not define either term, which created unconstitutional vagueness that could chill speech.¹⁷⁶ In COPA, Congress changed the Act to target "material that is harmful to minors,"¹⁷⁷ and defined the phrase using *Miller's* obscenity standard.¹⁷⁸ Material that is obscene under *Miller's* three-prong test receives no constitutional protection. Although Congress believed it was merely regulating unprotected obscenity, the courts disagreed.

2. COPA Meets the Courts

Much to the chagrin of its supporters, but to no one's surprise, COPA's beginnings mirrored those of the CDA.¹⁷⁹ On October 22, 1998, just one day after President Clinton signed COPA into law, seventeen plaintiffs filed suit in the U.S. District Court for the Eastern District of Pennsylvania.¹⁸⁰ The

170. *Reno*, 521 U.S. at 876.

171. *Id.*

172. *ACLU v. Reno*, 929 F. Supp. 824, 845 (E.D. Pa. 1996).

173. *Reno*, 521 U.S. at 877; *see also* 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH §14:66 (2005).

174. *See* § 223(c).

175. § 223(a), (d).

176. "'Indecent' does not benefit from any textual embellishment at all. 'Patently offensive' is qualified only to the extent that it involves 'sexual or excretory activities or organs' taken 'in context' and 'measured by temporary community standards.'" *Reno*, 521 U.S. at 871 n.35. In *Reno*, the Court distinguished the statute that was found constitutional in *Ginsberg* based on the statute's narrow definition of "indecent" to include only materials that are harmful to minors and "utterly without redeeming social importance." *Id.* at 865-66.

177. 47 U.S.C. §§ 231(a)(1), (e)(6).

178. *See Miller v. California*, 413 U.S. 15, 24 (1973).

179. "The pattern of Congress passing legislation and then it being instantly challenged has been repeated over and over again during the past seven years." Susan Hanley Kosse, *Try, Try Again: Will Congress Ever Get it Right? A Summary of Internet Pornography Laws Protecting Children and Possible Solutions*, 38 U. RICH. L. REV. 721, 723 (2004).

180. Wilt, *supra* note 59, at 395.

plaintiffs sought a preliminary injunction against enforcement of the Act and under the First and Fifth Amendments.¹⁸¹

After five days of testimony, the court rendered sixty-seven separate findings of fact relating to the Internet, COPA, and the Web.¹⁸² Among its most important findings was that once material is posted on the Web, the speaker cannot prevent the speech from going to a particular geographic area.¹⁸³ The court also found that “age verification screens,” a possible affirmative defense to COPA’s penalties, could potentially cost Web publishers thousands of dollars to implement.¹⁸⁴ COPA’s other defense, adult age verification, would require an Internet user to pay a yearly fee in order to obtain an Adult Check PIN.¹⁸⁵

In an opinion authored by Judge Reed, the court found that COPA must be subjected to strict scrutiny analysis, as it was a content-based regulation.¹⁸⁶ The Court noted that “[a]lthough there are lower standards of scrutiny where the regulation of general broadcast media or ‘commercial’ speech . . . are involved, neither is appropriate here.”¹⁸⁷ It rejected the government’s argument that the lowered scrutiny applied to the broadcast medium should be applied to internet speech.¹⁸⁸ Thus, the court determined that COPA must: 1) serve a compelling government interest; 2) be narrowly tailored to achieve that interest; and 3) be the least restrictive means of advancing that interest.¹⁸⁹

Although the court found that protecting children is a compelling government interest,¹⁹⁰ it found that COPA was not narrowly tailored for two reasons. First, COPA was not likely to meet the “least restrictive means” test.¹⁹¹ Although imperfect, blocking and filtering technology could block material from other countries and material in emails and chatrooms without

181. *ACLU v. Reno*, 31 F. Supp. 2d 473, 477 (1999) [hereinafter *COPA I*]. Plaintiffs advanced three claims: (1) that COPA was invalid on its face and as applied to them under the First Amendment due to its burden on constitutionally protected adult speech; (2) that COPA violated the rights of minors; and (3) that COPA was unconstitutionally vague under the First and Fifth Amendments. *Id.*

182. *Id.* at 477, 481–92.

183. *Id.* at 484.

184. *Id.* at 488.

185. *Id.* at 489–90. Approximately twenty-five services on the Web provided such adult PIN services at the time the district court heard the evidence. *Id.* at 489.

186. *COPA I*, 31 F. Supp. 2d at 493. Content-based regulations of speech are presumptively invalid and subject to strict scrutiny. *Id.* The Court wrote, “As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it.” *Id.* (quoting *Reno v. ACLU*, 521 U.S. 844, 885 (1997)).

187. *Id.* at 492–93.

188. *Id.* at 493.

189. *Id.*

190. *Id.* at 495.

191. *COPA I*, 31 F. Supp. 2d at 496–97.

burdening adult speech.¹⁹² COPA, on the other hand, would have left these materials untouched.¹⁹³ There was also evidence that minors could have the ability to legitimately possess credit or debit cards that would allow them to access harmful materials despite COPA's screening mechanisms.¹⁹⁴ Thus, the court found filtering and blocking software to be a less restrictive and more effective alternative to protect minors.¹⁹⁵

Second, the court found COPA overbroad and noted the "sweeping . . . forms of content" that COPA restricted.¹⁹⁶ COPA prohibited "any communication, picture, image, graphic image file . . . writing, or any other matter of any kind."¹⁹⁷ The court recommended that Congress limit its restrictions to cover only pictures, images, or graphic image files.¹⁹⁸ The court went on to suggest other changes Congress might make to create a constitutional statute. Bothered by COPA's harsh penalties, the court suggested that Congress employ lesser sanctions or incorporate COPA's affirmative defenses into the elements of the crime itself.¹⁹⁹ The court concluded that the Act was not narrowly tailored and was unconstitutionally overbroad.²⁰⁰ The district court granted the preliminary injunction, holding that plaintiffs would likely succeed on the merits.²⁰¹

3. COPA Is Appealed to the Third Circuit

On appeal, Judge Garth, writing for the Third Circuit, affirmed the injunction on different grounds.²⁰² Rather than relying on the district court's finding that COPA was not narrowly tailored, the court considered COPA's "contemporary community standards" criterion of judging whether materials are harmful to minors.²⁰³ Although the use of a community standards evaluation had been upheld in the analysis of other media,²⁰⁴ the court found this standard troublesome in the context of the Internet.²⁰⁵

The district court had found that the Internet, unlike broadcast, telephone, and cable media, does not allow the speaker to control the dissemination of his

192. *Id.* at 497.

193. *Id.*

194. *Id.* at 496–97.

195. *Id.* at 497.

196. *COPA I*, 31 F. Supp. 2d at 497.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *COPA I*, 31 F. Supp. 2d at 498.

202. *ACLU v. Reno*, 217 F.3d 162, 165–66 (3d Cir. 2000) [hereinafter *COPA II*].

203. *Id.* at 166.

204. *Id.* at 175 (citing *Hamling v. United States*, 418 U.S. 87, 106 (1974); *Sable Commc'n of Cal. v. FCC*, 492 U.S. 115, 125–26 (1989)).

205. *COPA II*, 217 F.3d at 166.

material.²⁰⁶ Since a Web publisher's speech is available to everyone with an Internet connection, and there exists no geographical "community" for Internet speech, the Third Circuit reasoned that Web publishers would have to abide by the "standards of the community most likely to be offended by the message."²⁰⁷ Based on this sole provision of the statute, and without addressing the district court's holding, the Third Circuit found COPA unconstitutionally overbroad.²⁰⁸

4. COPA's First Trip to the Supreme Court

The government appealed the Third Circuit's narrow holding—that COPA's contemporary "community standards" criterion was unconstitutionally overbroad—to the Supreme Court.²⁰⁹ In an 8-to-1 decision authored by Justice Thomas, the Court vacated and remanded the Third Circuit's ruling.²¹⁰ After reviewing the *Reno* decision and the two prior decisions in this case, the Court held that the "reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment."²¹¹ The Court stressed that "community standards need not be defined by reference to a precise geographic area."²¹² Rather, jurors could judge whether material is harmful to minors based on their personal knowledge.²¹³

Although the members of the Court overwhelmingly agreed with COPA II's holding, they produced several opinions,²¹⁴ foreshadowing that COPA had not yet overcome the last of its obstacles. The Court stressed that it would not

206. *COPA I*, 31 F. Supp. 2d at 495.

Web publishers cannot restrict access to their site based on the geographic locale of the Internet user visiting their site. In fact, "an Internet user cannot foreclose access to . . . work from certain states or send differing versions of . . . communication[s] to different jurisdictions . . . The Internet user has no ability to bypass any particular state." *COPA II*, 217 F.3d at 176 (quoting *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997)).

207. *Id.* at 177 (quoting *Reno v. ACLU*, 521 U.S. 844, 877–78 (1997)).

208. *Id.* at 178–81. Although the court affirmed the preliminary injunction, it did so reluctantly. The Third Circuit quoted the Supreme Court's *Reno* opinion: "[S]ometimes we must make decisions that we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result." *Id.* at 181 (quoting *Reno v. ACLU*, 31 F. Supp. 2d 473, 498 (1999)). The Third Circuit further expressed its confidence that developing technology would "soon render the community standards challenge moot." *Id.*

209. *Ashcroft v. ACLU*, 535 U.S. 564 (2002) [hereinafter *COPA III*].

210. *Id.* at 566, 586.

211. *Id.* at 585.

212. *Id.* at 576.

213. *Id.* at 576–77 (citing *Hamling v. United States*, 418 U.S. 87, 105 (1974)).

214. Justices O'Connor and Breyer filed separate opinions and concurred in the judgment. *Id.* at 586–91. Justice Kennedy entered another concurring opinion, joined by Justices Souter and Ginsberg. *Id.* at 591–602. Justice Stevens entered a dissenting opinion. *Id.* at 602–12.

consider whether COPA would pass constitutional scrutiny in other respects and would not address issues raised by the district court.²¹⁵ The Court vacated the Third Circuit's judgment and remanded the case for further proceedings, while upholding the preliminary injunction.²¹⁶

5. Back to the Third Circuit

On remand, the Third Circuit reconsidered the district court's grant of a preliminary injunction, this time in light of the many opinions authored by the Supreme Court.²¹⁷ In subjecting COPA to strict scrutiny, the court found that the government did have a compelling interest in protecting children; however, COPA's provisions were not narrowly tailored to meet this goal.²¹⁸ The court took issue with three provisions of COPA.²¹⁹

COPA's regulations targeted material designed to appeal to the prurient interests of minors, a judgment left to "the average person, applying contemporary community standards" and "taking the material *as a whole*."²²⁰ Under the First Amendment, all speech must be evaluated in context, rather than in isolation, to determine the level of protection it should receive.²²¹ Otherwise, a mere photograph in a book or scene in a movie could render an entire work obscene.²²² For this reason, the court found COPA's plain terms troublesome.²²³ As the court noted, COPA regulates "*any* communication, picture, image file . . . or other matter of any kind," that appeals to the prurient interest of minors, making it difficult to apply the "as a whole" standard.²²⁴ Under COPA's plain terms, each individual communication or image would be considered "a whole" by itself.²²⁵

The court next found the term "minor," defined in the statute as "any person under 17 years of age," troublesome.²²⁶ Because "minor" could cover persons from infancy to age seventeen, Web publishers would not know what

215. *COPA III*, 535 U.S. at 585–86.

216. *Id.*

217. *ACLU v. Ashcroft*, 322 F.3d 240, 243 (3d Cir. 2003) [hereinafter *COPA IV*].

218. *Id.* at 251.

219. *Id.*

220. 47 U.S.C. § 231 (e)(6) (2000) (emphasis added).

221. *COPA IV*, 322 F.3d at 252.

222. *See generally id.*

223. *Id.* at 252–53.

224. *Id.* at 252. "It is unclear whether what is to be judged as a whole is a single image on a Web page, a whole Web page, an entire multipage Web site, or an interlocking set of Web sites." *Id.* (quoting *COPA III*, 535 U.S. 564, 593 (2004) (Kennedy, J., concurring)).

225. *Id.* at 253. The court gave the example of a sexual image within a collection of art. *Id.* Although such an image could be deemed harmful by itself, it might not "appeal to the prurient interest" if viewed in the context of an art collection. *Id.*

226. 47 U.S.C. § 231(e)(7) (2000); *COPA IV*, 322 F.3d at 253–54.

standards their material must meet.²²⁷ The court wrote that “materials that have ‘serious literary, artistic, political or scientific value’ for a sixteen-year-old [do not] have the same value for a minor who is three years old.”²²⁸ Moreover, since the Act covered such a wide age range, it would regulate a great deal of protected Internet speech.²²⁹ In this respect, too, COPA was not narrowly tailored so as to survive strict scrutiny.²³⁰

Additionally, the court found that COPA’s limited coverage of commercial speech still did not sufficiently limit COPA’s scope.²³¹ The Act’s expansive definition of “engaged in the business,” covered “any person whose communication ‘includes *any material* that is harmful to minors’ and who devotes time . . . to such activities as a *regular* course of such person’s trade or business, with the objective of earning a profit.”²³² Thus, the Act would apply to commercial pornographers as well as those who merely sell goods or services on the Web or simply seek to earn revenue from Internet traffic, as long as some part of their Web-site contains harmful material.²³³

Finally, the court found that COPA’s affirmative defenses were not sufficiently narrowed.²³⁴ To avoid penalty under COPA, Web-publishers must require age verification or employ other reasonable measures to ensure that minors do not gain access to their harmful material.²³⁵ However, the court feared that age verification screens would cause Web-publishers to lose some adult users and otherwise burden speech.²³⁶ Further, affirmative defenses do not prevent prosecution, and they leave the burden of proof with the speaker.²³⁷ Filtering and other technological means would prevent minors from accessing sites harmful to them without burdening protected adult speech.²³⁸

The court did not stop with holding that COPA was not narrowly tailored to meet the government’s interest of protecting minors. Mirroring the district

227. *COPA IV*, 322 F.3d at 254.

228. *Id.* at 253–54.

229. *See id.* at 258–61.

230. *Id.*

231. *Id.* at 256.

232. *COPA IV*, 322 F.3d at 256 (quoting 47 U.S.C. § 231(e)(2)(B) (2000)).

233. *Id.* The court pointed to the district court’s finding that approximately one-third of all Web-sites could be included in COPA’s expansive definition of “commercial purposes.” *Id.* at 257.

234. *Id.* at 259.

235. § 231(e)(1).

236. *COPA IV*, 322 F.3d at 259. In particular, the court expressed its fear that adults would be unwilling to provide personal information, such as a credit card number, especially if the material they wish to access is sensitive or controversial. *Id.* The founder of PlanetOut, a gay and lesbian Web-site, stated that many people would stop using the site if users were forced to identify themselves. Adam Cohen, *Cyberspeech on Trial*, TIME, Feb. 15, 1999, at 52.

237. *COPA IV*, 322 F.3d at 260.

238. *Id.*

court's opinion, the court found blocking and filtering technology to be a less-restrictive way to protect children from harmful Internet material.²³⁹ The court concluded by going beyond the issues it was handed by the Supreme Court and the district court, perhaps in attempt to remedy the narrowness of its first opinion.²⁴⁰ The court held that COPA was overbroad, relying on the same provisions that led to its finding that COPA was not narrowly tailored: the inability to evaluate prohibited material "as a whole," the Act's broad definition of both "minor" and "commercial purposes," and the chilling effect of its affirmative defenses.²⁴¹ The court again wrote that the "community standards" provision rendered COPA overbroad.²⁴² Thus, the court found that COPA was not narrowly tailored, did not represent the least restrictive means available, and was unconstitutionally overbroad.²⁴³ The Third Circuit upheld the injunction a second time.²⁴⁴

6. The Court Hears *COPA V*

a. A Divided Court

Again, the government appealed the Third Circuit's decision.²⁴⁵ And, for the second time, the Supreme Court considered whether COPA violated the First Amendment protections provided to Internet speech.²⁴⁶ On June 29, 2004, in a 5-to-4 decision, the Court held that COPA was not the least restrictive means available to meet the government's interest.²⁴⁷ Justice Kennedy delivered the opinion of the Court, joined by Justices Stevens, Souter, Thomas and Ginsburg.²⁴⁸

The Court applied a strict scrutiny analysis, again giving the government the burden to prove that the Act was narrowly tailored to meet a compelling government interest and that the Act was the least restrictive means available.²⁴⁹ The Court first examined whether COPA had employed the least restrictive available alternative to regulate harmful Internet speech.²⁵⁰ The Court noted that the district court had found blocking and filtering technology

239. *Id.* at 265.

240. *Id.* at 266–70.

241. *Id.*

242. *COPA IV*, 322 F.3d at 270.

243. *Id.* at 251, 265–66.

244. *Id.* at 271.

245. *Ashcroft v. ACLU*, 542 U.S. 656 (2004) [hereinafter *COPA V*].

246. *Id.* at 659.

247. *Id.* at 672.

248. *Id.* at 658.

249. *Id.* at 672 (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992)). The majority emphasized that content-based prohibitions have "the potential to be a repressive force in the lives and thoughts of a free people." *Id.*

250. *COPA V*, 542 U.S. at 666.

to be a less restrictive, more effective means of protecting children.²⁵¹ The Court noted the flaws with COPA in comparison to filtering technology: filters can block most harmful materials from children, where COPA would only be able to enforce its restrictions in the United States; COPA's age verification screens could be circumvented by some minors; COPA could encourage U.S. providers to relocate overseas; and filters can apply to all Internet materials, including e-mail, rather than merely protecting children from harmful materials found on Web-sites.²⁵² Most importantly, filtering technology would not burden adult speech.²⁵³

The Court further considered the findings of the Commission on Child Online Protection, which Congress itself created.²⁵⁴ The Commission, too, had found filtering technology more effective than age-verification requirements.²⁵⁵ Although filtering technology has flaws, such as allowing some explicit material to reach the user and blocking out material that has educational value, the Court found that the government failed its burden to show that such technology was, in fact, less effective than COPA.²⁵⁶ The government argued that Congress cannot require Internet users to implement filtering technology; however, the Supreme Court disagreed.²⁵⁷ The Court stated that it had "held that Congress can give strong incentives to schools and libraries to use [filtering technology]."²⁵⁸ Thus, Congress may also give incentives for development of filtering technology and incentives for consumers to implement filtering technology at home.²⁵⁹ The Court found that filtering technology was a not only a less restrictive alternative to COPA, but a more effective alternative.²⁶⁰

Beside the existence of a more effective, less restrictive alternative to COPA, the Court found other problems with the Act. As in *Reno*, the Court expressed a concern that COPA's penalties could chill protected speech.²⁶¹ Even where an Internet site requires the user to verify his majority age, the harmful materials on the Web site could still subject the Web publisher to

251. *Id.* at 666–68.

252. *Id.* at 668.

253. *Id.* The Court stated that, using filtering technology, adults could access Internet speech without identifying themselves or providing credit card information. *Id.* Moreover, promoting filters does not condemn speech. *Id.*

254. *Id.*

255. *COPA V*, 542 U.S. at 668. The Court noted that the COPA Commission's report assigned a "score for 'Effectiveness' of 7.4 for server-based filters and 6.5 for client-based filters, as compared to 5.9 for independent adult-id verification, and 5.5 for credit card verification." *Id.*

256. *Id.* at 669.

257. *Id.*

258. *Id.* (citing *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194 (2003)).

259. *Id.*

260. *COPA V*, 542 U.S. at 667.

261. *Id.* at 671.

prosecution.²⁶² Thus, the Web publisher could be subject to prosecution despite his compliance with the Act, with only an affirmative defense for protection.²⁶³ The Court emphasized that “[w]here a prosecution is a likely possibility, yet only an affirmative defense is available, speakers may self-censor rather than risk the perils of trial. There is a potential for extraordinary harm and a serious chill upon protected speech.”²⁶⁴

Finally, the Court noted that factual questions still linger in the case. The Court stated that because the case had been twice appealed to the Supreme Court, the parties had not presented new factual findings for almost five years²⁶⁵—an eternity in Internet years. The Court wrote that it had to let the decision stand because the government had not met its burden, but that new facts could change this.²⁶⁶ Thus, the Court sent COPA all the way back to the drawing board—for a full trial in Philadelphia—leaving COPA’s fate uncertain for yet a few more years.²⁶⁷ In conclusion, the Court held out some hope to COPA supporters, emphasizing that its decision did “not hold that Congress is incapable of enacting any regulation of the Internet designed to prevent minors from gaining access to harmful materials.”²⁶⁸

b. Justice Stevens Concurrs in the Opinion

Justice Stevens, joined by Justice Ginsberg, concurred in the opinion.²⁶⁹ Stevens again found COPA unconstitutional based on the statute’s “contemporary community standards” criterion, which was used to determine whether material is harmful in violation of the Act.²⁷⁰ In *Ashcroft*’s first visit to the Supreme Court, Stevens expressed the same opinion in his dissent, stating that “in the context of the Internet, . . . community standards become a sword rather than a shield. If a prurient appeal is offensive in a puritan village, it may be a crime to post it on the World Wide Web.”²⁷¹

However, Justice Stevens agreed with the majority’s finding that filtering and blocking software acted as a less restrictive alternative to COPA.²⁷² In

262. *See id.*; 47 U.S.C. § 231(c)(1) (2000).

263. *See COPA V*, 542 U.S. at 670.

264. *Id.*

265. *Id.* To demonstrate the need for new factual findings, the Court looked to statistics given by the Internet Systems Consortium, which state that the number of Internet hosts increased from 36.7 million hosts as of July 1998 to approximately 233.1 million hosts as of January 2004. *Id.* (citing Internet Systems Consortium, *ISC Internet Domain Survey*, Jan. 2004, <http://www.isc.org/index.pl?/ops/ds>)

266. *Id.* at 672.

267. *Id.*

268. *COPA V*, 542 U.S. at 672.

269. *Id.* at 673.

270. *Id.*

271. *Id.* (quoting *COPA III*, 535 U.S. 564, 603 (2002) (Stevens, J., dissenting)).

272. *Id.* at 674.

particular, he emphasized the harshness of COPA's penalties, writing that "[c]riminal prosecutions are . . . an inappropriate means to regulate the universe of materials classified as 'obscene' since 'the line between communications which "offend" and those which do not is too blurred to identify criminal conduct.'"²⁷³ Justice Stevens emphasized that COPA's penalties were "strong medicine" when filtering technology or plain, old-fashioned adult supervision could both protect children and leave Internet speech unburdened.²⁷⁴

c. Justices Scalia and Breyer Dissent

In his brief dissent, Justice Scalia wrote that the majority erred in subjecting COPA to the strict scrutiny test.²⁷⁵ After examining past Supreme Court decisions, Scalia emphasized that commercial entities that "deliberately emphasize the sexually provocative aspects" of their products "engage in constitutionally unprotected behavior."²⁷⁶ Scalia wrote that the entire business of selling pornography on the Internet could be banned in a manner consistent with the First Amendment.²⁷⁷

Justice Breyer filed a separate dissenting opinion, in which Chief Justice Rehnquist and Justice O'Connor joined.²⁷⁸ Breyer agreed that the Act should be subjected to a strict scrutiny analysis, but did not believe that Congress's objectives could be accomplished through other, less restrictive means.²⁷⁹ Breyer noted the similarities between *Miller's* obscenity definition and the very material COPA sought to regulate,²⁸⁰ and emphasized that the Act primarily covered materials that receive no First Amendment protection.²⁸¹ Because speech that would appeal to the prurient interest of minors would likely appeal to the prurient interest of adults, COPA does not burden protected speech.²⁸² Thus, COPA presents no First Amendment problem.²⁸³

273. *COPA V*, 542 U.S. at 674–75 (quoting *Smith v. United States*, 431 U.S. 291, 316 (Stevens, J., concurring in part and dissenting in part)).

274. *Id.* at 675.

275. *Id.* at 676 (Scalia, J., dissenting).

276. *Id.* (quoting *United States v. Playboy Entm't Group*, 529 U.S. 803, 831 (2000) (Scalia, J., dissenting)).

277. *Id.*

278. *COPA V*, 542 U.S. at 676.

279. *Id.* at 677.

280. *Id.* at 678. Breyer emphasized that speech that appeals to the prurient interest and speech devoid of serious literary artistic, political, or scientific value is the only speech that falls within COPA's prohibitions. *Id.* at 679. These elements match *Miller's* definition of legally obscene; thus, almost all of the speech COPA regulates would be speech that already receives no First Amendment protection. *Id.*

281. *Id.* at 679–80.

282. *Id.* Justice Breyer listed examples of speech that, he thought, would *not* be subject to COPA's penalties, including discussions on sexually transmitted diseases, birth control and

Second, Justice Breyer emphasized that the Act does not censor speech, “[r]ather, it requires providers of the ‘harmful to minors’ material to restrict minors’ access to it by verifying age.”²⁸⁴ Breyer wrote that the cost of implementing an age verification screen is minimal and that many commercial Web-sites already require such age verification.²⁸⁵ Breyer also pointed out that other burdens that could stop Internet users from visiting harmful Web-sites, such as embarrassment, did not automatically deem a regulation unconstitutional.²⁸⁶

Justice Breyer then examined the Court’s finding that the Act failed to employ the least restrictive means available to advance the government’s interest. Breyer wrote that blocking and filtering technology existed when COPA was created, and that COPA was Congress’s attempt to provide protection beyond filtering.²⁸⁷ Thus, the majority, by finding that filtering technology was a less restrictive alternative, was simply holding that it was less restrictive to do nothing.²⁸⁸ Breyer then emphasized the deficiencies of filters. He noted the district court’s finding that filters can both under-block and over-block Internet material.²⁸⁹ He further noted that filters can be costly, and parents maintain the responsibility of installing the technology.²⁹⁰ This information, Breyer opined, could lead Congress to the reasonable conclusion that blocking and filtering software is not an effective solution.²⁹¹ Breyer concluded that the Act, properly interpreted, “risks imposition of minor

homosexuality, and postings of literary works. *Id.* at 680. He emphasized that such works are “not both (1) ‘designed to appeal to . . . the prurient interest’ . . . and (2) lacking in ‘serious literary, artistic, political, or scientific value.’” *Id.* at 681. Thus, such material would remain unregulated. *Id.*

283. *COPA V*, 542 U.S. at 681–82. Later in his dissent, Breyer states that “[the Court] could construe the statute narrowly—as I have tried to do—removing nearly all protected material from its scope. By doing so, we could reconcile its language with the First Amendment’s demands.” *Id.* at 690–91.

284. *Id.* at 682.

285. *Id.* at 682–83.

286. *Id.* Breyer quoted the Court’s plurality opinion in *United States v. American Library Ass’n, Inc.*, stating that “[t]he Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment.” *Id.* at 683 (quoting *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 209 (2003)).

287. *Id.* at 683–87.

288. *COPA V*, 542 U.S. at 683–84.

289. *Id.* at 684–86.

290. *Id.* at 685. Breyer further states:

More than 28 million school age children have both parents or their sole parent in the work force, at least 5 million children are left alone at home without supervision each week, and many of those children will spend afternoons and evenings with friends who may well have access to computers and more lenient parents.

Id.

291. *Id.* at 686.

burdens on some protected material—burdens that adults wishing to view the material may overcome at modest cost,²⁹² while achieving Congress's goal of protecting children.²⁹³ In Breyer's view, the Act was constitutional.²⁹⁴

Finally, Justice Breyer reacted to the Court's remand of the case for further findings. Breyer pointed out that neither side had asked to present further evidence, and that it was anybody's guess what either party could add to the matter.²⁹⁵ Furthermore, he wrote that there was nothing more Congress could do to regulate the Internet, given the Court's decision in this case.²⁹⁶ He criticized the majority, stating that if the Court was taking the position that the Internet cannot be legislated, or that criminal penalties cannot be employed to regulate the Internet, then it should state so clearly rather than sending the case back to the district court.²⁹⁷

VI. ALTERNATIVE SOLUTIONS TO MEET CONGRESS'S GOAL

Congress and many Americans believe there is an urgent need to protect children from Internet pornography, and for good reason.²⁹⁸ The business of Internet pornography has flourished in the past few years, and today it accounts for two-thirds of all Internet-generated revenue.²⁹⁹ The growth of this now \$2.5 billion dollar industry has sparked Rep. Michael Oxley, COPA's co-author, and the Bush administration to proclaim that this will not be the end of their attempt to defend COPA and to regulate the Internet.³⁰⁰ In fact, as recently as July of 2005, both the House and the Senate have entertained new bills to protect children from Internet pornography.³⁰¹

292. *Id.* at 689.

293. *COPA V*, 542 U.S. at 689.

294. *Id.*

295. *Id.*

296. *Id.* at 689–90.

297. *Id.* at 689–91.

298. Morality in Media, Inc., *Americans Still Want Federal Obscenity Laws Enforced Against Hardcore Internet Pornography, According to Poll Results*, Mar. 18, 2004, <http://www.moralityinmedia.org/obscenityEnforcement/Wirthlin2004.htm>. According to its study, Morality in Media, Inc. reports that some eighty-two percent of adult Americans surveyed in March 2004 said that “federal laws against Internet obscenity should be vigorously enforced.” *Id.*

299. Declan McCullagh, *Supreme Court Keeps Net Porn Law on Ice*, http://ecoustics-cnet.com.com/Supreme+Court+keeps+Net+porn+law+on+ice/2100-1028_3-5251475.html (last updated June 29, 2004).

300. *Id.* Rep. Michael Oxley promised that “[t]he fight for COPA and our children is not over. I will contact the Department of Justice and ask it to mount an aggressive case to show the court that there is technology to make COPA work” Oxley Reacts to Supreme Court Ruling on COPA, June 29, 2004, <http://oxley.house.gov/news.asp?FormMode=Detail&ID=378>.

301. See S. 1507, 109th Cong. (2005); H.R. 3479, 109th Cong. (2005). These identical bills refer to the new proposed legislation as the “Internet Safety and Child Protection Act of 2005.” S. 1507 § 1; H.R. 3479 § 1. The proposed Act's most notable changes are its regulation of

The Court, too, is interested in protecting children from the Internet pornography boom. In *Reno*, the Court made several suggestions as to how Congress could create constitutional legislation.³⁰² In *COPA V* the majority assured COPA supporters that it did “not hold that Congress is incapable of enacting any regulation of the Internet designed to prevent minors from gaining access to harmful materials.”³⁰³ However, despite public outcry and the Court’s mixed messages, drafting constitutionally sound legislation has proved exceedingly difficult. Below, Part A will analyze a proposed COPA-like regulation based on the Court’s decisions in *Reno* and *Ashcroft*, and determine whether it could pass judicial scrutiny. Part B will consider non-legislative measures that have already been employed to protect children, as well as other means that may enable Congress to reach its goal.

A. *Creating a New Regulation*

1. *Creating a Constitutional COPA*

The Internet has been referred to as a forum that allows the voice to resonate “farther than it could from any soapbox”³⁰⁴ and that allows “a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”³⁰⁵ These unique qualities necessitate heightened First Amendment protection for speech in this medium. To their demise, both the CDA and COPA impinged on Internet speech by regulating not only obscene material, but also material that is protected as to adults, and other valuable speech. A look at the plaintiffs in both *Reno* and *Ashcroft* demonstrates the great burdens these statutes imposed. Founders of Web-sites devoted to teaching doctors, promoting AIDS awareness, and speaking out against rape were among those that objected to COPA’s enactment.³⁰⁶ As the courts have emphasized, for Internet regulations to pass constitutional muster, these speakers must remain untouched.³⁰⁷

“pornographic materials” and the change in the definition of “minor” from age seventeen to age eighteen. S. 1507 § 101; H.R. 3479 § 101. Additionally, the Act places a burden on banks, credit card companies, and anyone else that performs financial transactions related to Internet pornography to ensure that only age-verified transactions are processed. S. 1507 § 102; H.R. 3479 § 102. The proposed Act requires “regulated pornographic Web site[s]” to use age-screening software and imposes a twenty-five percent tax on the amount the Internet provider charges to those that view its pornographic materials. S. 1507 § 201; H.R. 3479 § 201.

302. See *Reno v. ACLU*, 521 U.S. 844, 876–78 (1997).

303. *COPA V*, 542 U.S. 656, 672 (2004).

304. *Reno*, 521 U.S. at 870.

305. *Ashcroft v. ACLU*, 535 U.S. 563, 566 (2002) (quoting 47 U.S.C. § 230(a)(3) (Supp. V 1994)).

306. *Id.* at 571 n.4.

307. *Reno*, 521 U.S. at 870.

Congress acted quickly when it formulated the CDA, and later COPA. In its haste, Congress put restrictions on Internet speech that were more “sweeping”³⁰⁸ than it had ever intended.³⁰⁹ In actuality, Congress’s goal in creating both Acts was merely to eliminate “teaser ads” from the Internet—free pornographic images offered by some commercial pornography sites to induce Internet users to enter the next screen and then pay to enter the site.³¹⁰ What Congress drafted, however, were statutes with “unprecedented”³¹¹ scope, too broad to survive First Amendment scrutiny.

COPA V and *Reno* teach an important lesson: for Congress to draft constitutional legislation, it must not burden protected Internet speech. Congress must carefully define the terms and phrases of its regulation and avoid imposing heavy sanctions that could chill free speech. Additionally, Internet speakers should have more than an affirmative defense for protection.

Thus, very narrow legislation that targets only obscene teaser ads that appear before a credit card screen could pass judicial scrutiny. Such legislation would greatly narrow COPA’s scope and repair its many flaws. The legislation would not require Web publishers to implement expensive age verification screens. Adults that utilize these sites would not bear the burden of disclosing additional personal information, and Web-sites would not lose business—only sites that already require credit cards would be affected.³¹² Further, only sites that are “commercial” in the sense Congress intended—sites that profit from the obscene material itself—would be subject to penalty. The result of this statutory language would be simply that obscene Web-sites with teaser ads would be required to remove or alter their ads.

308. *COPA I*, 31 F. Supp. 2d 473, 497 (E.D. Pa. 1999).

309. “In response to public outcry that the Internet was becoming a dangerous place for our country’s youth, Congress ignored constitutional precedent and created the most politically expedient solution in each legislative attempt.” Robert K. Magovern, *The Expert Agency and the Public Interest: Why the Department of Justice Should Leave Online Obscenity to the FCC*, 11 *COMMLAW CONSPECTUS* 327, 340 (2003).

310. Cohen, *supra* note 236. The district court noted in its decision that the measure would curb not only teaser ads, but a wide range of more useful speech. See *COPA I*, 31 F. Supp. 2d at 497. In oral arguments before the Supreme Court, petitioner’s counsel stated:

[m]aterial which is obscene is usually kept behind [an age verification screen] . . . the [age verification screen] that the statute requires is already in existence with respect to commercial pornography sites. . . . [W]hat the purveyors of [commercial pornography] do is put in front of the screen provocative material that we submit would meet the definition of harmful to children and make that available to everybody to entice people to go the next step to use their credit card or their age identification mechanism

Transcript of Oral Argument at 8, *COPA I*, 542 U.S. 656 (No. 03-218).

311. *Reno v. ACLU*, 521 U.S. 844, 877 (1997).

312. The Third Circuit feared that adults would be unwilling to provide personal information, such as a credit card number, especially if the material they wish to access is sensitive or controversial. *COPA IV*, 322 F.3d 240, 259 (3d. Cir. 2003).

Moreover, this proposed regulation could evade the Court's strict scrutiny analysis. Because the regulation would target only sites with obscene teaser ads and credit card verification screens, it would not affect protected speech. Safe-sex Web-sites, rape counseling sites and medical and educational sites would be well outside the proposed regulation's scope. When a regulation affects only unprotected speech, as this regulation would, it is not subject to strict scrutiny. Rather, Congress can freely regulate, criminalize, or completely ban the speech despite the First Amendment.³¹³ As such, the regulation would not have to represent the least restrictive means available. Despite the existence of filtering technology, this narrow statute could survive judicial scrutiny.

In *COPA V*, Justice Kennedy emphasized the potential for a statute that utilizes harsh criminal penalties, with only an affirmative defense for protection, to chill protected speech.³¹⁴ The proposed regulation could largely eliminate this problem. Only Web-sites that are both obscene and require a credit card before allowing entry would be subject to the regulation. Very little protected speech could fall into this narrow category. Thus, speakers engaging in protected speech would be less likely to fear that the regulation could affect them, and, in turn, less likely to self-censor. Further, the district court in *COPA I* suggested that a possible remedy to COPA's chilling effect could be to incorporate the elements of its affirmative defense into the crime itself.³¹⁵ By imposing restrictions only on those who have verification screens, this proposed regulation would do just that.

The harsh penalties that the CDA and COPA imposed, including thousands of dollars in fines and up to two years imprisonment, also led to their downfall.³¹⁶ In *American Library Ass'n*, part of the Court's justification for upholding legislation that encouraged libraries and schools to install filters was that the statute merely withheld funds instead of imposing harsh penalties.³¹⁷ To ensure that a new regulation is acceptable, Congress would be well-advised to impose a lesser penalty on speakers. An act with the CDA's or COPA's daunting sanctions could chill the speech of even those outside the statute's scope.

B. *Non-legislative Measures*

The hypothetical regulation proposed in Section A could possibly pass judicial scrutiny and would affect Congress's goal of eliminating obscene teaser ads. But would the passage of such a statute really protect our children?

313. See generally *Miller v. California*, 413 U.S. 15 (1973).

314. *COPA V*, 542 U.S. 656, 670–71 (2004).

315. *COPA I*, 31 F. Supp. 2d at 497.

316. See 47 U.S.C. §§ 223(d), 231(a) (2000).

317. *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 212 (2003).

The district court in *COPA I* found that over forty percent of all pornographic Web-sites originate in foreign countries.³¹⁸ The Supreme Court emphasized that regulations on Internet speech in the United States could send Web publishers overseas, where they could avoid penalty altogether.³¹⁹ Further, narrowing regulations to cover only teaser ads would still leave recreational Web-sites and harmful emails and chatrooms wide open to minors. Thus, a statute narrow enough to pass Court scrutiny does not protect children. Indeed, even the broadest statute cannot cover a great deal of this harmful Internet material. This Section discusses some more effective solutions as well as some of the alternatives Congress has already put into place to protect children.

1. Blocking and Filtering Technology

As the courts have emphasized, blocking and filtering technology may be the best alternative to protect children from Internet pornography. This technology can block explicit images in the United States and abroad, whether on the Web, in emails, or in chatrooms. In *Playboy*, the Court considered legislation that would protect children from unscrambled cable signals by forcing cable providers to eliminate or reschedule indecent programming.³²⁰ Because households have the option to block the transmission of unwanted channels, Congress's legislation was not the least restrictive means available.³²¹ Filtering technology is analogous to a blocked cable transmission. Those who wish to protect their children can, leaving others to browse the Internet and speak freely.

The effectiveness of a filter will depend, in part, on the type of filter utilized. Today, there are four filter options: client-side filters, content-limited Internet providers, server-side filters, and search engine filters.³²² Client-side filters allow an adult to configure the filter and choose the materials he or she wishes to block.³²³ Under a content-limited system, the Internet provider will supply access to a portion of the Internet, while blocking the remainder.³²⁴ All of the Internet provider's customers receive the same limited service. Server-side filters are best for schools or libraries, where all users must conform to the same policy regarding Internet use.³²⁵ Finally, there are search engine filters, which will block out inappropriate materials that are returned in an Internet

318. *COPA I*, 31 F. Supp. 2d at 484.

319. *COPA V*, 542 U.S. at 667.

320. *United States v. Playboy Entm't Group*, 529 U.S. 803, 806-07 (2000).

321. *Id.* at 825-27.

322. Emily R. Novak, Comment, *Lost in Cyberspace: An Analysis of How the Supreme Court May Help Children Find Their Way Safely on the Internet*, 14 DEPAUL-LCA J. ART & ENT. L. & POL'Y 325, 355-56 (2004).

323. *Id.*

324. *Id.*

325. *Id.*

search, but will not block a site when the exact address is typed into the address bar.³²⁶

Blocking and filtering technology appears more effective than the CDA or COPA, but as the courts have pointed out, it has its problems. A reporter for *Time* recently wrote of her experience with filtering devices, stating that some devices “either fail to block pornographic websites altogether or block so many sites that your browser becomes unusable.”³²⁷ Thus, parents may want to consider another alternative: protective monitoring. A protective monitor allows an adult to see the Web-sites that his or her child has previously accessed.³²⁸ Unlike filtering, this alternative cannot prevent a minor from reaching inappropriate Web-sites; but knowing that an adult can retrace their steps may deter children from intentionally seeking out pornographic materials.³²⁹

No one device provides the perfect solution for safe Internet use for children. The answer, however, may not be to implement one single line of defense against unwanted materials. According to the National Research Council, a blend of technical and educational steps could be the ideal way to protect children.³³⁰ Thus, a filter, together with an educated child and parental supervision may be the best bet. Parents must educate themselves and understand that filters and monitors should supplement adult supervision, not replace it.

2. Congressional Measures

Although it will be difficult for Congress to create COPA-like legislation that is both constitutional and effective, Congress may be able to use other means to reach its goal of protecting children. Already, it has created the Dot Kids Implementation and Efficiency Act of 2002.³³¹ The Act mandated the creation of an entire domain, “dot kids,” that contains only material that is appropriate for children under thirteen.³³² George Bush signed the Act into

326. *Id.* at 356.

327. Anita Hamilton, *The Web Porn Patrol*, TIME, July 12, 2004, at 87. The author noted that when using one filtering device she was unable to log onto a Nickelodeon Web-site, a Web-site designed especially for children. *Id.*

328. *Id.*

329. *Id.*

330. “No single approach can provide a solution, since any one approach alone can be circumvented with enough effort. A balanced mix of strategies is needed.” David Lazarus, *Net Porn Filters Just Don’t Work*, <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2002/11/13/BU158763.DTL> (last visited February 1, 2005) (quoting former Attorney General Richard Thornburgh, chairman of the committee that prepared the NRC’s study).

331. See Dot Kids Implementation and Efficiency Act of 2002, Pub. L. 107-317, 116 Stat. 2766 (2002). The “dot kids” domain can be found at <http://www.kids.us>.

332. *Id.* at § 2; see MARCIA S. SMITH, CONGRESSIONAL RESEARCH SERVICE, INTERNET: STATUS REPORT ON LEGISLATIVE ATTEMPTS TO PROTECT CHILDREN FROM UNSUITABLE

effect in December of 2002, stating: “[W]e must give our nation’s children every opportunity to grow in knowledge without undermining their character . . . we must give parents the peace of mind knowing their children are learning safely.”³³³ Committee reports liken this domain to the children’s section of a library: it is entirely appropriate for children, without burdening adult speech in any way.³³⁴ Today, more than 1,700 dot kids domain names have been sold.³³⁵

Congress has also made it easier for children to browse the Internet without accidentally accessing pornographic materials. Under the “Truth in Domain Names” provision of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003,³³⁶ it is a crime to use a misleading domain name to deceive a person into viewing Internet obscenity or to deceive minors into viewing material harmful to them.³³⁷ Prior to the Act, typing “whitehouse.com” rather than “whitehouse.gov” into a Web-browser would take the Internet user to a hard-core pornography site.³³⁸ Today, the Act prohibits this and imposes criminal penalties on those who use such misleading Web addresses.

In the future, Congress may also be able to utilize its spending power to protect children from harmful Internet materials. In *American Library Ass’n*, the Court upheld a statute that allowed the government to withhold funds from public schools and libraries that fail to implement filtering technology.³³⁹ The Court stated that Congress had provided the funds so that libraries and schools could provide Internet access, thus, Congress could condition receipt of the funds on whether they are used in the manner anticipated and authorized.³⁴⁰ In *COPA V*, the Court suggested that Congress further utilize this power to provide “strong incentives” for the development of filtering technology and its implementation home.³⁴¹

Congress’s taxing power could also be utilized to help protect children. Tax incentives could encourage individuals to implement filtering technology and set off the cost of doing so. In fact, the latest bills entertained by both the House and Senate have done just that.³⁴² Among other things, the bills require

MATERIAL ON THE WEB 5 (May 26, 2004), available at http://digital.library.unt.edu/govdocs/crs/data/2004/upl-meta-crs-5804/RS21328_2004May26.pdf.

333. Novak, *supra* note 322, at 358–59.

334. *Id.*

335. SMITH, *supra* note 332, at 5.

336. Pub .L. No. 108-21 § 521, 117 Stat. 650, 686.

337. *Id.*

338. LIPSCHULTZ, *supra* note 101, at 188–89.

339. *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 214 (2003).

340. *Id.* at 212.

341. *See COPA V*, 542 U.S. 656, 669 (2004).

342. *See S. 1507*, 109th Cong. (2005); *H.R. 3479*, 109th Cong. (2005).

Web providers that sell Internet pornography to pay a twenty-five percent tax on the amounts charged to customers.³⁴³

V. CONCLUSION

As Justice Breyer's dissent in *COPA V* emphasized, "No one denies that . . . an interest [in protecting children] is compelling."³⁴⁴ However, courts have also expressed that no matter how compelling the interest, free expression on the Internet is worthy of protection, too. Ultimately, it seems unlikely that COPA will pass judicial scrutiny despite the Supreme Court's recent refusal to hold it unconstitutional. It is difficult to conceive of technological advances or other evidence that the government could produce on remand to cure COPA's many pitfalls. The courts have sent a message: This ineffective statute is not worth the burden on speech that it would impose.

As outlined above, the Court has not precluded Congress from protecting children from Internet obscenity. Thus far, Congress has encouraged the use of filters in public libraries and schools, created a safe domain especially for children, and enacted legislation to make it less likely that a child will inadvertently stumble upon pornographic material. In the future, Congress may be able to utilize its spending and taxing powers to further encourage the development and use of filtering technology. The Court's holding in *COPA V* does not leave children unprotected. It merely requires Congress to protect children in a way that does not infringe on our new, but fundamental right to free speech on the Internet.

AMY WANAMAKER*

343. *Id.*

344. *COPA V*, 542 U.S. at 683.

* J.D. Candidate 2006, Saint Louis University School of Law.